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**COURT OF APPEALS CLERK OF COURT OF APPEALS  
DISTRICT I OF WISCONSIN**

**Case No. 16AP55CR**

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Milwaukee County 10CF5217

Robert Mario Wheeler,

Defendant-Appellant.

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BRIEF OF DEFENDANT-APPELLANT ON APPEAL FROM THE  
JUDGMENT OF CONVICTION AND POST-CONVICTION ORDER  
DENYING RELIEF, THE HONORABLE DENNIS FLYNN PRESIDING

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### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The Defendant does not request that oral argument be granted in this case and asserts that publication is not necessary as there is not a novel situation presented herein.

### **STATEMENT OF ISSUES PRESENTED**

Whether the trial court violated the Defendant's due process rights in rendering a decision of guilty as to the felon in possession of a firearm without closing argument and prior to the return of the jury's verdict on the first degree reckless injury count.

Trial Court: No.

Whether the doctrine of retroactive misjoinder should apply under the facts of this case.

Trial Court: No.

Whether there is sufficient evidence to support the finding of guilt as to the felon in possession charge.

Trial Court: Not addressed.

## **STATEMENT OF CASE**

The Defendant, Robert Mario Wheeler, respectfully requests review of a Judgment of Conviction entered against him on December 12, 2011, the Honorable Dennis Flynn presiding, finding the Defendant guilty of Felon in Possession of a Firearm. The Defendant also seeks review of the Decision and Order Denying Motion for New Trial entered March 25, 2015. The Defendant asserts three points of error for this court's consideration. First, the Court erred in violating the Defendant's Due Process Rights in rendering a decision on Count 1 of the Information before the Jury had returned a verdict as to Count 2 and without allowing argument of counsel. Second, the doctrine of "retroactive misjoinder" is applicable in this case as evidence on the Recklessly Endangering the Safety of Another charge "prejudicially spilled over" as to the Felon in Possession of Firearm charge and impermissibly tainted the results on that charge. Third, the defendant asserts that there is insufficient evidence to support a conviction in this case. Therefore, the Defendant asserts that his conviction as to Count 1 should be vacated and a new trial be ordered.

This case has a long and tortured history. Robert Mario Wheeler was originally charged in October 2010 with a two-count complaint alleging Felon in possession of a Firearm and 1<sup>st</sup> Degree Reckless Injury. Following a year of preliminary proceedings the matter finally came to trial on October 24, 2011 before Reserve Judge Dennis Flynn. Wheeler, through his attorney, chose at this

time to waive his right to a jury trial as to Count 1 – the Felon in Possession of a Firearm charge. The matter was addressed right before the jury was to be picked.

Defense counsel asserted, in relevant part:

So my proposal is that we, in a sense, bifurcate the trial. We will agree to waive our right to a jury trial on the charge of felon in possession of a firearm and just have this case proceed on the shooting charge, because the issue is identification, we are not disputing that the incident happened.

We are just saying it wasn't Mr. Wheeler who did it. So, after the jury renders its verdict, the Court having heard all the evidence, will – can then make its own determination as to felon in possession of a firearm.

I would suggest that if the jury find him not guilty of him being the shooter, then I would expect that the verdict on felon in possession of a firearm would be not guilty.

Transcript of Jury Trial, October 24, 2011, pp. 12-13. Accordingly, the court granted Wheeler's request for a Court Trial on that count. Transcript of Jury Trial, October 24, 2011, p. 16.

The Second Count – First Degree Reckless Injury – proceeded to jury trial over the next four days. The case centered around the identification of the Defendant as the perpetrator of gunshot wound to Charles Fisher on October 19, 2010. The testimony portion of the trial concluded after two days on October 26, 2011. The jury deliberated that evening and returned on October 27, 2011 to continue its deliberations. On that date the jury had several questions for the Court. The jury was not able to reach a verdict and was released for continuing deliberations the following day.

Inexplicably, before releasing the jury on October 27, 2011, the Judge, sua sponte, chose to render a decision as to Count 1. The jury had yet to reach a decision as to Count 2 at this point. Again, this is important because the theory of the case in defense was simple – misidentification. If Wheeler was not the man who shot Charles Fisher on October 19, 2010, then he obviously did not possess a firearm at the time either. This follows logically from the fact that Mr. Fisher was in fact shot by someone with a gun. That fact was undisputed.

The Judge found Wheeler guilty of Count 1 – Possession of a Firearm by a Felon. Prior to this finding, the Judge asked for no closing arguments by counsel. No summation of the evidence as seen by either side. No recitation of the facts in evidence. Nothing. In fact, the Judge seemed rushed and impatient to reach a quick decision stating: “Because I have to be in another court on a very important matter tomorrow and can’t be here, I am now going to make my decision in Count 1.” Transcript of Jury Trial, October 27, 2011, p. 8. (R:110). What could be more important than the guilt or innocence of a man for a felony? And why the rush? The jury was still engaged in ongoing deliberations as to Count 2.

Interestingly, just before the Judge rendered his decision as to Count 1, he had re-read Criminal Jury Instruction 140 – Burden of Proof – to the jury following a question that it had regarding its deliberations. The judge noted in relevant parts: “The defendant is not required to prove his innocence”, “The burden of establishing every fact necessary to constitute guilt is upon the State”

and “If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant’s innocence, you should do so and return a verdict of not guilty.” Transcript of Jury Trial, October 27, 2011, pp. 5-6. (R:110). Despite these statements as to burden of proof, the judge went on to place all the evidence in the light most favorable to the State in rendering his decision as to the guilt of Mr. Wheeler possessing a firearm.

The Judge’s finding on this point is brief – indeed the summation of the evidence by the judge takes up no more than 1 page of transcript:

Now I am going to note certain facts. Mr. Fisher identified the defendant as possessing a gun and shooting at him. (no cross exam).

Stephen Jackson similarly identified the defendant as possessing a gun and shooting at him. Ms. Buckner corroborated Mr. Fisher in IDing the defendant as a possible shooter of a handgun in her statement in terms of shortly after the event of the shooting event itself, Mr. Fisher identified to Ms. Buckner that the shooter was the defendant.

Similarly, Officer Busshardt corroborates Mr. Fisher, and then there is the testimony of Detective Dorava and in terms of identification, the photographic arrays, he indicated that both Mr. Fisher and Mr. Jackson selected the defendant as a person who was the shooter.

Scientist Simonson established that all of the nine millimeter cartridges were fired from the same gun and that two of the bullets recovered were fired from the same gun barrel.

Defendant’s sister, Nina Wheeler established that the defendant was contacted after there was a disagreement in her home and advised of Mr. Fisher’s altercation with her, and of course the testimony from her then was that the defendant chose not to be involved in it, but she did establish that knowledge was possessed by the defendant of an altercation at the home of Ms. Nina Wheeler.



Transcript of Jury Trial, October 27, 2011. (R:110, 10-11).

Less than 24 hours later, the court declared a mistrial due to the fact that the jury was unable to reach a unanimous verdict as to Count 2. The court noted:

“That motion is granted and a mistrial is declared because of a hung jury because the jury has not been able to come to a decision after all of the information is presented by the parties, and the jury was instructed on the law, and the jury did spend a substantial amount of time deliberating, as Counsel pointed out, over a day and a half.” Transcript of Jury Trial October 28, 2011, p. 6. The court then remanded Mr. Wheeler into the custody of the Milwaukee County Sheriff as to Count 1 and set the matter over for a sentencing on December 9, 2011. Defense counsel objected to the matter being set for sentencing prior to a determination as to the status of Count 2. The court overruled said objection.

On November 10, 2011, the parties appeared before Judge Charles f. Kahn, Jr. for a scheduling conference as to all matters. Defense counsel brought an objection to the matter proceeding to a sentencing the following month before Judge Flynn noting “I think that it wouldn’t be appropriate to sentence without knowing what the verdict is as to the primary charge.” Transcript of Scheduling Conference, November 10, 2011, p. 4. (R:112). Following some additional colloquy as to due process considerations and error as to Judge Flynn’s finding of guilt, Judge Kahn instructed counsel to bring the matters before Judge Flynn prior

to sentencing. The remaining count was then set over for further proceedings on January 30, 2012.

On December 9, 2011, the parties appeared in court for sentencing before Judge Flynn. Defense counsel again objected to the sentencing proceeding at that time explaining “I haven’t been able to get the transcripts that I wanted, but also I think it’s appropriate that sentencing be done when the case is fully resolved so that the Court can be fully advised as to what the circumstances are.” Transcript of Sentencing December 9, 2011, p. 3. The court denied the motion to adjourn on both counts and sentenced Wheeler to a maximum term of imprisonment of 6 years as to Count 1. The initial term of confinement in the Wisconsin Prison System was for 2 years with a maximum term of extended supervision not to exceed 4 years.

Following over 14 months of various court proceedings the case was set for a jury trial to be held on February 13, 2013. On that date the parties appeared before the Honorable J.D. Watts and the State made the following statement:

Your Honor, we are unable to proceed at this time. One of the citizen witnesses was unavailable – or not able to be located to be served with a subpoena on the last jury trial date.

Since that time, they have made a number of efforts to try to locate this person to serve this person. I believe, to a certain degree, he is avoiding service. In addition, he hasn’t returned any of the Victim/Witness’ phone calls, responded to any letters.

I would not be able to proceed without that person on this trial. In addition, I just learned today that one of the officers who was able to provide

a crucial bit of evidence is not available any longer to testify on this matter as well, which would have impacted my ability to proceed.

At this point in time, I do not believe this case is provable beyond a reasonable doubt, and I am not moving forward.

Transcript of Jury Trial, February 13, 2013, pp. 2-3 (R:120). The case was then dismissed. A motion for postconviction relief was subsequently brought and denied by the trial court on March 25, 2015. This appeal now follows.

### **ARGUMENT**

1. The trial court violated the Defendant's due process rights in rendering its decision of guilty as to the felon in possession of a firearm charge without closing argument and prior to the return of the jury's verdict on the first degree reckless injury count.

The first argument is one of due process. The Defendant asserts that a decision as to Count 1 was to be made AFTER the Jury Trial on Count 2 and AFTER both sides were given an opportunity to be heard as to what the evidence had shown as to the Felon in Possession of Firearm charge. Indeed, the trial court itself stated clearly and unequivocally on the record following the close of testimony: "So if we get whatever the verdict is, whether it is today or tomorrow, please don't let it end until you tell me, by the way, Judge, you're supposed to make a decision on the other count and I will , but it'll be after the jury has reached its verdict." Transcript of October 26, 2011, p. 135. (R:108:135) Neither of those things occurred in this case. Indeed, as set forth above, the Court, sua

sponte, rendered its decision on Count 1 prior to the jury's return on Count 2 and without any argument from counsel on the charge and in complete disregard of his own previously stated position that nothing would be decided until after the jury had returned its verdict.

A review of the trial transcript bears this point out. Defense counsel made a point of noting that Count 1 would only be considered by the Court "after the jury renders its verdict, the Court having heard all the evidence, will – can then make its own determination as to felon in possession of a firearm." Transcript of Jury Trial, October 24, 2011, p. 13. (R:98:13) There is nothing in the transcripts following this assertion to undercut the fact that the parties expected that a decision on Count 1 would be rendered only after the jury came back on Count 2. Indeed, the parties and the Court all understood that as of October 24, 2011, the Defendant was waiving his right to a jury trial as to the Felon in Possession of a Firearm, the State was waiving any right it had to a trial on that same issue, and the Court would decide the guilt or innocence of the Defendant on that issue after the jury returned a verdict on Count 2.

The jury trial on Count 2 ended in a mistrial. The jury was unable to reach a verdict as to whether Mr. Wheeler had recklessly endangered the safety of Mr. Fisher by shooting him. There is no dispute that Mr. Fisher was shot however. So, somebody carrying a gun on the evening of October 19, 2010 walked past a place where Mr. Fisher was present, pointed the gun in his direction and opened

fire hitting him at least once. The jury hearing this evidence, however, could not unanimously agree that Mr. Wheeler had been the perpetrator of the crime. It is hard to imagine a scenario where the same evidence at the jury trial could lead to a conclusion that Mr. Wheeler possessed a gun if he was not found guilty of having shot Mr. Fisher. This is why it was critical for the Court to wait and allow the jury to speak first before rendering its decision. What makes this fact even more critical is that the State ultimately declared in open court that it could not prove its case as to the Reckless Injury charge beyond a reasonable doubt. Indeed, that charge was dismissed. (R:120).

Compounding the problem is the fact that the Court chose to render its decision in a hurry without the benefit of any argument of counsel summarizing the evidence as it related to the Felon in Possession of Firearm charge. As noted above the court's decision was essentially a page of transcript and began with a very troubling statement – "Because I have to be in another court on a very important matter tomorrow and can't be here, I am now going to make my decision in Count No. 1." Transcript of Jury Trial, October 27, 2011, p. 8. It is respectfully asserted that the matter before the court – the guilt or innocence of the defendant as to a felony – was incredibly important, certainly to Mr. Wheeler. His freedom was at stake. He was facing potential incarceration. For the court to rush through judgment on this very important issue is not only unfair but impermissible. Most importantly, the record reveals that the Court was in fact

available the following day and was actually present when the matter was declared a mistrial. See Transcript of Jury Trial, October 28, 2011. (R:111).

Substantive and procedural due process rights emanate from the Fourteenth Amendment. See Wis. Const. art I, sec 8. Substantive due process protects individuals against governmental actions that are arbitrary and wrong, “regardless of the fairness of the procedures used to implement them.” Penterman v. Wisconsin Elec Power, 211 Wis.2d 458, 480, 565 N.W.2d 521 (1997). Moreover, it forbids a government from exercising “power without any reasonable justification in the service of a legitimate governmental objective.” County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). Procedural due process protects individuals from governmental “denial of fundamental procedural fairness.” *Id.* at 845-46. A person complaining of due process violations must show a deprivation by the state of a constitutionally protected interest in life or liberty. *Id.*

Here, there is no dispute but that Mr. Wheeler has demonstrated that he has been deprived of his liberty interest. His right to be free and not incarcerated was directly at stake during this proceeding. The Court’s premature decision as to Count 1 violated Mr. Wheeler’s right to be free as he was sentenced on that count to a six year sentence restraining his freedom in every way. The Court’s decision in this was arbitrary and wrong and thus violates Mr. Wheeler’s substantive due process rights. The court was obligated to wait until the jury had rendered its verdict and then rule. With no jury finding that Mr. Wheeler had shot at Mr.

Fisher it follows that he did not possess a firearm at the same time. Again, Mr. Fisher was shot by somebody – but the jury could not determine that it was by the hand of Mr. Wheeler and the State subsequently determined that it could NOT present evidence that would ever convict Mr. Wheeler of the crime of recklessly endangering the safety of Mr. Fisher.

The procedural due process violation in this case is grounded upon the notion that a defendant should not be denied fundamental procedural fairness. Again there is no question that Mr. Wheeler was deprived of his constitutionally protected interest in liberty. Moreover, the Court's action in this case demonstrate fundamental unfairness in procedure. The court rushed to judgment prior to waiting for the jury verdict. The Court did not follow the procedures that had been set for determining the guilt or innocence on Count 1 prior to the start of the trial and agreed upon by the parties. And finally, the Court never entertained any closing argument by counsel.

These violations of both substantive and procedural due process require that the Judgment of Conviction in this matter be vacated and that a new trial be granted.

2. Retroactive misjoinder should apply under the facts of this case.

The second point of error in this case is that of “retroactive misjoinder.” The doctrine of retroactive misjoinder arises where joinder of multiple counts was proper initially, but later developments such as a trial court's dismissal of some

counts for lack of evidence render the initial joinder improper. State v. McGuire, 204 Wis. 2d 372, 379, 556 N.W.2d 111 (Ct. App. 1996)(citing United States v. Vebeliunas, 76 F.3d 1283 1293 (2d Cir. 1996). “In order to invoke “retroactive misjoinder,” a defendant must show “compelling prejudice.” Prejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal may constitute compelling prejudice.” Id. at 1294. The Wisconsin Court of Appeals ultimately adopted the three-factor analysis as set forth in Vebeliunas for determining whether a defendant shows compelling prejudice arising from the evidence introduced to support the vacated or dismissed counts. McGuire, 204 Wis. 2d at 379. “(1) whether the evidence introduced to support the dismissed count is of such an inflammatory nature that it would have tended to incite the jury to convict on the remaining count; (2) the degree of overlap and similarity between the evidence pertaining to the dismissed count and that pertaining to the remaining count; and (3) the strength of the case on the remaining count. Id.

Here, the first point worth noting is that the trier of fact on the “remaining” count was not a jury but the Court. It is hard to see how this could possibly defeat a full consideration of the issue. The Court is the trier of fact and serves the same purpose as a jury in terms of considering a defendant’s innocence or guilt.

As to the three-part analysis, the Defendant asserts that he has met all three criteria and, therefore, his conviction on Count 1 must be vacated.



First, there can be little argument but that the evidence introduced to support the dismissed count is of such an inflammatory nature that it would have tended to incite the Judge to convict on the Felon in Possession of Firearm charge. The evidence was unbelievably inflammatory. Mr. Fisher testified that he was shot in the chest and the bullet went completely through his chest. Transcript of Jury Trial, October 25, 2011, p. 27. He testified that he then fell to the ground. Id. He then stood up and realized that he was bleeding and required medical assistance. Id.

Second, as to the degree of overlap and similarity between the evidence pertaining to the dismissed count and that pertaining to the remaining count, there is a sufficient disconnect as to satisfy this requirement as well. First Degree Reckless Injury of Another is defined in the Criminal Code of Wisconsin as having been committed “by one who recklessly causes great bodily harm to another human being under circumstances that show an utter disregard for human life.” Transcript of Jury Trial, October 26, 2011, p. 72. Here, the Court instructed the jury that it must find that the following three elements were present in this case: “First, that the defendant caused great bodily harm to Charles Fisher.” Id. “Secondly, the State must show that the defendant caused great bodily harm by criminally reckless conduct.” Id. And last “the State must prove that the circumstances of the defendant’s conduct showed an utter disregard for human

life.” Id. at 73. Nowhere in the instructions is there any mention of the possession of a gun by the Defendant.

The Felon in Possession of Firearm instruction, which the Court referred to in its deliberations, notes specifically that the defendant must possess a firearm. Transcript of Jury Trial, October 27, 2011, p. 10. The court further noted that the term “possess” means that the defendant knowingly had actual, physical control of a firearm. Id. In its ruling, the court states as follows: “Mr. Fisher identified the defendant as possessing a gun and shooting at him.” The fact that Mr. Fisher alleged that the Defendant had shot at him would not be relevant or necessary as to the charge of simple possession of a gun by the Defendant. The “shooting” fact is extremely prejudicial and would lead any trier of fact to hold that fact against him as to a possession of firearm allegation. The Court makes no reference in its decision as to the facts that there was credible testimony that the perpetrator of the shooting was wearing a hoodie obscuring his or her face, that the perpetrator had to ask if it was Mr. Wheeler on the porch, that the Defendant was last seen by two people wearing a “Pea Coat,” and that no gun was ever recovered linking it to the Defendant.

The only other “identification” fact mentioned by the Court during its determination of guilt on the Felon in Possession of a Firearm charge was equally skeletal. The Court stated that “Stephen Jackson similarly identified the defendant as possessing a gun and shooting at him.” Again, the statement links both crimes

together – possession and the shooting. Clearly, the Court had linked both crimes in its mind as it was rendering its decision. It had already found Mr. Wheeler guilty of the Reckless Endangering Charge despite the fact that that was the job of the jury. And the jury did in fact come back with an answer contradicting that of the Court – namely, we cannot decide whether there is evidence to support a finding that Mr. Wheeler was the perpetrator of the shooting of Mr. Fisher. Thus, the defendant has succeeded in its burden of proving that there is a sufficient disconnect as to the evidence to be proffered at trial solely as to the Felon in Possession of a Firearm charge.

Third, the strength of the case – Felon in Possession of Firearm – is very strong standing on its own in this case. The testimony of the defense witnesses shows that Mr. Wheeler did not possess a firearm. The testimony shows that he was home with his wife and children around 5:30 and showed no signs of having a firearm at that time. The testimony shows that Mr. Wheeler went for a walk with his wife and dog – again, with no sign of a weapon. The testimony shows that Mr. Wheeler went over to his friend’s house and visited socially with him for approximately 3-45 minutes. This friend further testified that Mr. Wheeler showed no signs of agitation and showed no signs of possessing a weapon at any time. Several witnesses testified that Mr. Wheeler was wearing a “Pea Coat” and not a hoodie as testified to by Mr. Fisher and Mr. Jackson.

In short, the record is replete with “good” facts leading to a conclusion that Mr. Wheeler was never in possession of a firearm. Accordingly, the Defendant has met his burden of showing that the strength of his case as to Felon in Possession of a Firearm was excellent. With all three factors of the McGuire test having been met it is right for this Court to vacate its decision and allow this matter to proceed upon its own merits at a new trial.

3. There is insufficient evidence to uphold a conviction in the present case as to the felon in possession of a firearm charge.

The third argument is that there is insufficient evidence in the present case to uphold a determination that Mr. Wheeler was ever in possession of a gun so as to be found guilty of felon in possession of a firearm. In reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990). That is exactly the case here.

First, the testimony of Stephen Jackson. Mr. Jackson was on the porch above and away from the street. (R:101, P. 57). He stated that “me and Chuck were sitting there talking and we see somebody come up. I am like somebody come up. ... and I don’t know who that is, but then they left.” *Id.* at 58. He then testified that this unknown person came back out shooting and was wearing

sweatpants, sweatshirt and running shoes. *Id.* Miraculously, the witness then goes on to identify Mr. Wheeler as the shooter of the gun despite having just testified that he could not see who the person was. *Id.* at 59. Further, upon cross-examination Mr. Jackson admitted that he could identify him and as soon as the shooting started he jumped over the railing of the porch and ran. *Id.* at 66-67. Last, Mr Jackson testified that he knew who the shooter was because the victim had told him who it was. *Id.* at 68-69. These facts cast serious doubt and speculation as to whether Mr. Jackson did in fact witness the defendant in possession of a firearm. Clearly the jury in this case had serious misgivings about the identification of the defendant by Mr. Jackson. Any reliance on this testimony by Mr. Jackson should be found to have no probative value and should be completely disregarded by this court.

As to Mr. Fisher's testimony. The backdrop for Mr. Fisher's testimony is as follows – it was dark out, there is somebody coming down the street in front of the home where Mr. Fisher was on the porch, the person has a hoodie covering his face, the person wearing the hoodie asks if the person on the porch is “Chuckie”, and the defendant and the victim have known each other for over 12 years. Also, Mr. Fisher had just broken up with his girlfriend who was also the defendant's sister that same date. Additionally, Mr. Fisher had testified against some individuals in the recent past which might logically conclude an independent person to believe he was being shot as retaliation for that testimony. A case of

mistaken identification by Mr. Fisher which had the result of rendering the jury incapable of determining guilt against Mr. Wheeler beyond a reasonable doubt as to the shooting.

Mr. Fisher's testimony begins with him detailing the fact that he and his girlfriend Nina Wheeler had just broken up on the afternoon of October 19, 2010. Jury Trial Tr. At 18-20 (R:101). Mr. Fisher then testified to the fact that a melee broke out with his cousins and Nina. Id. 20-23. Mr. Fisher then chronicled the fact that he and Robert Wheeler had been "friendly" for a lengthy period of time coinciding with his dating of Robert's sister Nina. Id. at 24. Mr. Fisher noted that the person who opened fire that night had to ask "is that Chucky up there?" Id. at 26. On cross-examination, Mr. Fisher testified that he had never once had a physical confrontation with Robert over their 12 year relationship. Id. at 38. Robert was not present during the altercation between Mr. Fisher and Nina. Id. at 41.

At the time of the shooting, Mr. Fisher testified that the person walking down the street in front of the house in question had a hoodie pulled over his face. Id. at 43. Mr Fisher also testified to the fact that he had been involved in a confrontation on Mill Road in 2009 where a shooting took place. Id. at 46-47. Mr Fisher admitted that he had been shot during that confrontation and had testified against a man in that case who was ultimately found not guilty. Id. at 48. Finally, Mr. Fisher testified that Robert had called him the day after the shooting and had

told Mr. Fisher that he had not shot him. Id. Mr. Fisher responded that “if it wasn’t you, then who was it?” Why would he say that if he had a positive identification of Mr. Wheeler on the night in question?

All of these facts lead to the inescapable conclusion that Mr. Fisher had misidentified Robert Wheeler as the shooter in the case based on his erroneous belief that Nina wanted Robert to seek revenge on Mr. Fisher for breaking off their relationship and engaging in a melee with his cousin and himself at her residence earlier that day. Mr. Fisher “believed” Robert Wheeler shot him, told Stephen Jackson that Robert Wheeler had shot him, but had no actual identification of Robert Wheeler as the shooter at the time in question. The subsequent photo array identifications are thus tainted as well. Both Mr. Fisher and Mr. Jackson went into the array simply looking for Mr. Wheeler. Accordingly, that testimony fails miserably as well and cannot be used to uphold the conviction of Mr. Wheeler in this case.

Further, nothing from the testimony of the Police Officers or the Scientist provide conclusive proof that Mr. Wheeler possessed a firearm at the time of the incident. No gun was found. The testimony of Scientist Simon was simply that the gun casings and bullets that were recovered were from the same gun. That testimony is of no import in tying Mr. Wheeler to the gun in question. And, again, the photo array testimony is of no import as it relates to the police officers. They simply corroborated what Mr. Fisher and Mr. Jackson told them at the arrays.

## **CONCLUSION**

For all of the forgoing reasons, the Defendant, Robert Mario Wheeler, respectfully requests that this court vacate the Judgment of Conviction dated December 12, 2011, and remand this matter for a new trial as to the charge of Felon in Possession of a Firearm.

Dated this 10<sup>th</sup> day of April, 2016.

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I hereby certify that this brief conforms to the rules contained in s.809.19 (8) (b) and (c) for a brief and appendix produced with a [monospaced] [proportional serif] font. The length of this brief is 20 pages and 5488 words.

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Stephen M. Compton

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s.809.19(2) (a) and that contains, at a minimum (1) a table of contents;

(2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s.809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings of decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Respectfully submitted this 10<sup>th</sup> day of April 2016.

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Stephen M. Compton

CERTIFICATION OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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Stephen M. Compton